Filed 8/22/19 Ohanesian v. Ohanesian CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ADELA G. OHANESIAN, Petitioner and Appellant, v. JOHN R. OHANESIAN, Respondent.	B288155 (Los Angeles County Super. Ct. No. BD398253) ORDER MODIFYING OPINION AND DENYING REHEARING NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on August 1, 2019, be modified as follows:

1. At the end of the first full paragraph on page 12, add the following:

> Adela asserts that she did not withhold evidence of her income and assets and, to the contrary, that she

provided information about her finances in income and expense declarations she filed back in 2015 and 2013, in a fee waiver application she filed a month before the imposition of the sanction, and in fee waiver applications and income and expense declarations she filed *after* the court imposed the sanction. The trial court ruled that the 2015 and 2013 documents were too old to be helpful; Adela never asked the court to consider the 2017 fee waiver application; and any information she provided *after* the imposition of sanctions did not exist at the time of that imposition and thus cannot impeach it. More fundamentally, the court's finding that Adela's representations were not credible applies regardless of the precise document(s) in which she made such representations.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

ASHMANN-GERST, Acting P.J., CHAVEZ, J., HOFFSTADT, J.

Filed 8/1/19 Ohanesian v. Ohasesian CA2/2 (unmodified opinion)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ADELA G. OHANESIAN, Petitioner and Appellant, v. JOHN R. OHANESIAN, Respondent.	B288155 (Los Angeles County Super. Ct. No. BD398253)

APPEAL from an order of the Superior Court of Los Angeles County. Richard J. Burdge, Jr., Judge. Affirmed.

Law Offices of Stephen M. Feldman and Stephen M. Feldman for Petitioner and Appellant.

Andrews Law & Mediation Offices and Tammy L. Andrews for Respondent.

Law Offices of Gregory R. Ellis and Gregory R. Ellis for Respondent.

* * * * * *

More than 13 years after a wife separated from her husband, eight years after the judgment of dissolution, and five years after we partially reversed that judgment on the issue of spousal support, the trial court dismissed the wife's claim for spousal support as a sanction for her "sweeping misuse of the discovery process." Nearly a year later, the trial court denied the wife's motion to vacate its earlier dismissal as void and awarded her former husband $7,700 in attorney fees. She now appeals. We conclude that the dismissal order is not void and that substantial evidence supports the fee award. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Adela Gregory Ohanesian (Adela) and John Ohanesian (John) married in 1989 and separated in 2003.[1] At the time of their separation, they owned two homes in the Beverly Hills Post Office area, including a 10,000 square foot home, as well as a vacation home and several luxury vehicles.

II. Procedural History

A. *Dissolution filing, trial and judgment*

Adela filed for dissolution in November 2003.

After a trial occurring over several days in 2006 and 2007, the trial court entered a judgment of dissolution in March 2008. Among other things, the court allocated the couple's substantial marital assets, awarded John full legal and physical custody of the couple's still-underage child, and ordered John to pay Adela

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1 We refer to the parties by their first names to avoid confusion. We mean no disrespect.

monthly spousal support at a starting rate of $5,000 but reducing to zero in four years.

B. *Appeal of judgment and remand*

Adela appealed several aspects of the dissolution judgment, including spousal support.

In February 2011, we issued an opinion that affirmed all aspects of the judgment except "[t]he portion of the judgment relating to spousal support." We concluded that the trial court had erred in fixing Adela's support to decrease to zero from a starting point of $5,000 per month because the court erred in (1) characterizing the couple's marital lifestyle as "'upper middle class'" rather than "'opulent,'" "'wealthy'" or "'upper class,'" (2) attributing a monthly income to Adela as a real estate agent in light of her sabbatical from such work and the "collapsing job and real estate market" in 2008, and (3) under-calculating John's yearly income by $110,000. We "return[ed] the matter to the trial court to rethink the fairness of its original [spousal support] award," and in the opinion's "Disposition," "reversed" "the spousal support" "portion of the judgment" and "remanded for further proceedings" on that issue.

C. *Actions on remand and entry of terminating sanctions*

Following remand, Adela repeatedly and consistently asserted that our opinion necessitated a retrial on the issue of spousal support. She also repeatedly and consistently asked the trial court to continue the date of the new trial so she could obtain discovery for use at that retrial.

Between 2014 and 2016, Adela violated several of the trial court's discovery orders.[2] She refused to disclose discovery notwithstanding orders to do so. As pertinent here, Adela disobeyed the trial court's (1) June 2014 order compelling her to respond to John's earlier demand for the production of documents, (2) June 2015 order compelling her to provide her tax returns, and (3) July 2016 order compelling her to respond to four sets of discovery requests propounded by John. Adela also promulgated discovery notwithstanding orders not to do so. As pertinent here, she issued 33 deposition subpoenas with compliance dates *after* the court's March 2016 discovery cut-off, including several subpoenas served months after that cut-off.

In September 2016, John moved for terminating or evidentiary sanctions, as well as monetary sanctions, based on the totality of Adela's discovery misconduct.

On December 13, 2016, the trial court granted John's motion for terminating sanctions and, in the alternative, evidentiary sanctions. As support, the court generally cited Adela's "sweeping misuse of the discovery process and refusal to provide . . . necessary information," and specifically cited Adela's violation of its June 2014, June 2015 and July 2016 orders compelling discovery as well as Adela's promulgation of 33 subpoenas in violation of the court's discovery deadline. "Monetary sanctions alone," the court found, had proven "wholly insufficient." The court had previously issued monetary sanctions in the amounts of $5,000, $3,970, and $3,500. Along

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2 The parties did not include information in the record about their litigation between 2011 and 2014.

with its terminating sanctions order, the court also awarded John $50,000 in "reasonable attorney[] fees."

D. *Adela's attacks on terminating sanctions order*

1. *Motion for reconsideration (the first motion)*

On January 5, 2017, Adela filed a motion asking the trial court to reconsider its terminating sanctions order on the grounds that (1) she had complied as best she could with the court's discovery rulings, (2) John's concealment of assets should have been taken into account, and (3) the order was void because (a) the trial judge had not signed the order while still physically seated on the bench, and (b) the judge had not properly responded to Adela's earlier motion seeking disqualification of the judge.

On February 8, 2017, the trial court denied the motion because, as a motion for reconsideration under Code of Civil Procedure section 1008, it was (1) untimely and (2) without merit, as it raised "no new or different facts, circumstances or law." The court also concluded that its prior order was not void. The court denied John's request for further sanctions without prejudice.

On February 10, 2017 and February 14, 2017, Adela filed two separate notices of appeal of the order denying reconsideration and of the dismissal order.[3] We dismissed the February 10, 2017 appeal because Adela did not comply with the pre-filing requirements that attach to her as a vexatious litigant

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3 However, in these two notices of appeal, Adela indicated that she was appealing from dismissal under the provisions in the Code of Civil Procedure related to delay of prosecution. We grant John's request for judicial notice of the existence of pertinent documents filed in Adela's February 14, 2017 appeal. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

and the February 14, 2017 appeal because it was duplicative of the first.

2. *Motion to vacate (the second motion)*

On October 2, 2017, Adela filed a motion to vacate the terminating sanctions order as void because it violated the mandate of our prior decision to set the spousal support issue for retrial.

On November 13, 2017, the trial court denied Adela's motion. The court ruled that the terminating sanctions order was consistent with our prior mandate (and thus not void) because Adela had lost her "right to a [re]trial" by "fail[ing] to participate in discovery" and "abus[ing] the discovery process." The court also awarded John $7,700 in attorney fees and costs pursuant to Family Code section 271. Although Adela represented that she was now living "at subsistence level," the court rejected her representation because she presented no "evidence of that," because she had not produced an income and expense declaration, and because her failure to define "subsistence level" left the court unable to conclude that "she [can't afford to pay] $500 a month" toward the sanctions, as the trial court had ordered. The court declined John's request to award an additional $50,000 in sanctions.

E. *Appeal*

Adela timely appealed the denial of her motion to vacate.

DISCUSSION

In this appeal, Adela argues that the trial court (1) erred in denying her motion to vacate its terminating sanctions order because that order is void, (2) erred in granting John $7,700 in attorney fees and sanctions because that obligation "impose[s] an unreasonable financial burden" on her, and (3) erred in issuing

the terminating sanctions order because (a) it is "inappropriate" for a variety of reasons, (b) its issuance followed the denial of her statutory right, under Family Code section 2030, to "access . . . legal representation," and (c) its issuance impermissibly violates her statutory right under Family Code section 3653 to retroactive spousal support.[4]

We cannot reach Adela's third argument (or any of its sub-parts) because they directly attack the terminating sanctions order, yet the only order properly before us in this appeal is the denial of Adela's motion to vacate the sanctions order *as void*. Because mere error in issuing an order at most renders it voidable rather than void (*Ex parte Gibson* (1867) 31 Cal. 619, 625 [noting "distinction between mere error" and voidness]; *People v. Karaman* (1992) 4 Cal.4th 335, 345, fn. 11 ["error" in the "exercise of . . . discretion" may not be corrected unless

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4 Adela's Family Code section 3653 argument—namely, that the trial court's terminating sanction deprived her of a vested right to past spousal support—pertains solely to the propriety of that terminating sanction, and *not* to whether the entry of that order was void. Adela cites the line of authority holding that the retroactive application of a new statute is void if it deprives a party of a vested property right (e.g., *Tulley v. Tranor* (1878) 53 Cal. 274, 279), but this line of authority does not support the much different proposition that a trial court may not enter a terminating sanctions order if dismissal would result in a loss of a vested right. This would render termination sanctions unavailable in a whole swath of cases, such as inverse condemnation. For the reasons discussed more fully below, the law does not dictate or counsel in favor of depriving trial courts of their authority to regulate contumacious discovery conduct for entire categories of litigants.

judgment is "void"]) and because only a claim resting upon voidness is properly before us (Code Civ. Proc., § 473, subds. (b) & (d)), Adela's claims that the court should not have issued the terminating sanctions order in the first place are not properly presented to us.[5] Accordingly, we turn to the first two issues.

I. Was the Terminating Sanctions Order Void?

A trial court may set aside a void order at any time. (Code Civ. Proc., § 473, subd. (d); *In re Estate of Estrem* (1940) 16 Cal.2d 563, 572.) An order is void when the court "lack[s] fundamental authority over the subject matter." (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56.) Because "the remittitur" of an appellate court "defines the scope of the jurisdiction of the court to which the matter is returned" (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701), a trial court's order is void if it "material[ly] vari[es]" from the terms of an appellate court's remittitur. (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982; *Hampton v. Superior Court of Los Angeles County* (1952) 38 Cal.2d 652, 655 (*Hampton*).) The remittitur of an appellate decision is "contained in the dispositional language" of the opinion, "read in conjunction with the opinion as a whole." (*Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 859; *Ducoing Management, Inc. v. Superior Court* (2015) 234 Cal.App.4th 306, 312-313 (*Ducoing*); see generally Code Civ. Proc., § 43 [outlining powers of appellate courts].) We independently interpret the remittitur of our prior opinions (*Ducoing*, at p. 313) and independently examine whether a trial

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5 She also forfeited her Family Code section 3653 argument by not raising it before the trial court or in her opening brief on appeal. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1218-1219.)

court's order is void (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496).

Adela offers three distinct and internally inconsistent reasons why, in her view, the trial court's terminating sanctions order is void.

In her first argument, Adela contends that the terminating sanctions order is void because it resulted in the dismissal of her claim for spousal support without any retrial and such a dismissal "material[ly] var[ies]" from our prior decision remanding the case for a retrial on that claim.

We agree with Adela that our prior decision ordered the trial court to conduct a retrial on the issue of spousal support. The "Disposition" portion of the opinion "reversed" the prior "spousal support" order and "remanded for further proceedings" on that issue. Such an order presumptively calls for a retrial. (*Hampton*, *supra*, 38 Cal.2d at p. 655 ["An unqualified reversal by the reviewing court presumes that the cause has been remanded for a retrial."].) What is more, the *nature* of the order that we remanded calls for a retrial: Spousal support turns on a number of factors such as the former spouses' "earning capacit[ies]," their "needs" and their "ability to . . . engage in gainful employment" (Fam. Code, § 4320, subds. (a), (d) & (g)); because spousal support is prospective as well as retrospective (Fam. Code, § 3603), a trial court needs up-to-date information to evaluate the proper level of spousal support under these factors. Retrial is the only way to obtain that evidence. (Cf. *Bach v. County of Butte* (1989) 215 Cal.App.3d 294, 302-303 [no retrial necessary where reversal leads to only one other result on remand]; *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 751 [no retrial necessary where appellate court expressly disavows any retrial].) The language in

the body of our opinion "return[ing] the matter to the trial court *to rethink the fairness* of its original award" does not undercut the necessity for a retrial because the court must also rethink what spousal support level is fair in a retrial and because it makes no sense to fix spousal support in 2019 based on financial information from the 2006-2007 trial that is now wholly out of date.

However, we disagree with Adela that the trial court's order dismissing her claim for spousal support due to her discovery abuse "material[ly] var[ies]" from our remittitur. Because, as explained above, the merits of the trial court's terminating sanctions order cannot now be challenged, Adela is effectively arguing that the trial court lacked any and all authority to dismiss her claim once we remanded the matter for retrial on that claim. This argument is flatly inconsistent with the plain language of the Civil Discovery Act (the Act) (Code Civ. Proc., § 2016.010 et seq.). The Act applies in dissolution proceedings (Fam. Code, § 210; *In re Marriage of Boblitt* (2014) 223 Cal.App.4th 1004, 1022) and applies after a remand from the Court of Appeal (*Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 250-251; *Province v. Center for Women's Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1682, disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 41; *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 504; *Beverly Hospital v. Superior Court* (1993) 19 Cal.App.4th 1289, 1295-1296). Because the statute authorizing terminating sanctions is part of the Act (Code Civ. Proc., § 2023.030), it applies here and thus empowers a court to issue terminating sanctions even after a remand for a retrial. Nothing in the Act expressly disempowers a trial court from doing so. And

immunizing litigants from any and all terminating sanctions upon remand would leave the trial courts powerless to address the type of pervasive and repeated misuse of the discovery process present in this case, even though the power to address such misconduct "is essential for every California court to remain ""a place where justice is judicially administered."" (*Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 764-765.) Indeed, because courts retain the power to dismiss a case remanded for retrial due to lack of prosecution (Code Civ. Proc. § 583.320, subd. (a)(3)), we divine no reason why they should not also retain the power to dismiss a case due to more egregious and intentional discovery misconduct.

In her second and third arguments, Adela argues that the trial court's terminating sanctions order was void because (1) our remand order mandated a retrial without any discovery, such that there should never have been any opportunity for her to commit discovery abuse, and (2) our remand order mandated an "immediate rethinking" of the spousal support order without any retrial at all. We reject these arguments. Not only are they inconsistent with one another and with Adela's first argument on appeal, they flatly contradict what Adela herself repeatedly demanded before the trial court—namely, a retrial preceded by extensive discovery. We decline to overturn the trial court for granting Adela the discovery and retrial she specifically requested. (E.g., *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.)

II. Did the Trial Court Abuse Its Discretion in Awarding John $7,700 in Attorney Fees and Costs?

A trial court may order one spouse to pay another's "attorney[] fees and costs" when the former's "conduct . . . furthers or frustrates the policy of the law to promote

settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys." (Fam. Code, § 271, subd. (a).) However, the court may not award these costs if doing so "imposes an unreasonable financial burden" on the owing spouse. (*Ibid.*) We review a trial court's award of fees and costs for an abuse of discretion (*In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1225), and review any subsidiary factual findings for substantial evidence (*id.* at p. 1226).

Substantial evidence supports the trial court's finding that the $7,700 sanction—to be paid at a rate of $500 per month—would not "impose[] an unreasonable financial burden" on Adela. Although Adela claimed that she was and continues to be "destitute," the trial court found her representations not to be credible and the court had a basis to do so—namely, that Adela had obtained substantial assets in the 2008 judgment and, even after being ordered to do so previously, had failed to provide any information regarding her current assets or income. "Where," as here, "a party unlawfully withholds evidence of [her] income and assets, [s]he will not be heard to complain that an order is not based on the evidence [s]he refuses to disclose." (*In re Marriage of Hofer* (2012) 208 Cal.App.4th 454, 458.)

Adela offers two further arguments. She invites us to weigh her credibility differently than the trial court, but this is an invitation we must decline. (*Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154, 192.) She also notes that the trial court did not adhere to the safe harbor provisions of Code of Civil Procedure section 128.7, but the court expressly declined to award sanctions under that provision so any noncompliance with its procedural mandates is irrelevant.

In light of this analysis, we have no occasion to address John's further arguments that Adela is disentitled from prosecuting this appeal or that her appeal is barred by the doctrines of claim preclusion, issue preclusion or law of the case.

DISPOSITION

The order denying Adela's motion to vacate and imposing sanctions under Family Code section 271 is affirmed. John is entitled to his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ